

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

INCORP SERVICES, INC.,
Plaintiff,

vs.

NEVADA CORPORATE SERVICES, INC.,
Defendant.

Case No. 2:09-CV-01300-GMN-GWF

ORDER

**Motion to Compel - #54
Counter-motion to Compel - #57**

This matter is before the Court on Plaintiff's Motion to Compel Production of Documents and Further Responses to Interrogatories and Requests for Admission and Request for Sanctions (#54), filed on May 12, 2010; Defendant Nevada Corporate Services, Inc.'s Opposition to Plaintiff's Motion to Compel Production of Documents and Further Responses to Interrogatories and Requests for Admission and Request for Sanctions and Counter-motion to Compel Production of Documents, Responses to Interrogatories and Requests for Admission and Request for Sanctions (#57), filed May 24, 2010; Plaintiff's Reply in support of Motion to Compel Production of Documents and Further Responses to Interrogatories and Requests for Admission and Request for Sanctions (#60), filed June 3, 2010; Incorp Services, Inc.'s Opposition to Defendant Nevada Corporate Services, Inc.'s Counter-Motion to Compel (#61), filed June 8, 2010; and Defendant Nevada Corporate Services, Inc.'s Reply in support of its Counter-motion to Compel (#62), filed June 11, 2010. The Court conducted a hearing in this matter on June 15, 2010.

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BACKGROUND

This action involves claims for defamation and violation of the Lanham Act, 15 U.S.C. §1125(a), based on allegedly false statements that Defendant made to Plaintiff's business clients.¹ Plaintiff Incorp Services, Inc. ("Incorp") and Defendant Nevada Corporate Services, Inc. ("NCS") provide company formation and registered agent services and compete for clients. *See Order (#50)*, pp. 1-2. From at least May 28, 2009 until August 27, 2009, NCS sent advertisements in the form of a letter to an unknown number of business organizations registered with the Nevada Secretary of State. There were apparently at least two versions of the letter. Plaintiff has produced a May 28, 2009 letter that was addressed to an individual named Klaus Egert in Cumming, Georgia. The first paragraph of this letter stated:

As you may already know, KE INTERIM MANAGEMENT LLC's current registered agent may be discontinuing its services. Registered agents throughout the state are closing, leaving their clients vulnerable and at risk. Read on for the 8 reasons that motivate me to personally fix this problem.

Defendant's Opposition to Motion to Compel (#57), Exhibit "A."

At the time this letter was sent and received by Mr. Egert, Plaintiff Incorp was the registered agent for KE Interim Management. Plaintiff's President, Tennie Sedlacek, states that after she received a copy of the letter that was sent to Mr. Egert, she received a few phone calls from other clients who received "similar, if not identical letters." These phone calls were not memorialized or otherwise recorded in documentary form and Plaintiff is unable to identify other clients who reported receiving similar letters from NCS. *Plaintiff's Opposition to Defendant's Counter-motion to Compel (#61), Exhibit "1"*.

Although the May 28, 2009 letter to Mr. Egert did not explicitly identify Incorp, Judge Jones held that "[a] reasonable jury could find: (1) NCS was negligent in failing to anticipate that the recipient of a letter stating that '[THE RECIPIENT'S] current resident agent may be discontinuing its services,' . . . would understand the letter to refer to Incorp where the recipient's

¹ On March 15, 2010, District Judge Jones denied Defendant's motion for summary judgment. The recitation of the facts in this order is based, in part, on the factual background set forth in the order denying summary judgment.

1 current resident agent was in fact Incorp; and (2) that such a(n) (mis)understanding was
2 reasonable.” *Order* (#50), p. 6. Judge Jones also held that the statement that the KE Interim
3 Management LLC’s current registered agent “may be discontinuing its services” is a statement of
4 fact which the jury may find to be defamatory to Incorp. *Id.*

5 NCS produced another version of the advertisement letter which was addressed to an
6 Elizabeth Jennings in Atlanta, Georgia. This letter is dated August 27, 2009. The opening
7 paragraph of this letter states: “Registered Agents throughout the State of Nevada are closing,
8 leaving their clients vulnerable and at risk. Read on for the 9 reasons that motivate me to
9 personally fix this problem.” *See Defendant’s Motion for Summary Judgment* (#22), *Exhibit “A”*.
10 Unlike the May 28, 2009 letter, the August 27, 2009 version does not refer to the recipient’s
11 “current registered agent” or specifically suggest that the recipient’s registered agent is about to
12 discontinue its services. As this Court reads Judge Jones’s March 15, 2010 order, the August 27,
13 2009 letter does not provide a basis for a cause of action for defamation or violation of the Lanham
14 Act.

15 In December 2009, Plaintiff served requests for production of documents, interrogatories
16 and requests for admissions on Defendant. Plaintiff’s discovery requests referenced an attached
17 “Exhibit A”. Upon learning that it had inadvertently failed to attach “Exhibit A” to its discovery
18 requests, Plaintiff sent a copy of the exhibit to Defendant’s counsel on February 2, 2010 and
19 granted Defendant additional time to respond to the discovery requests. *Motion to Compel* (#54),
20 *Exhibit “B”*. “Exhibit A” to Plaintiff’s discovery requests is the May 28, 2009 letter that NCS sent
21 to Klaus Egert. Defendant provided supplemental responses to Plaintiff’s discovery requests on
22 March 8, 2010. In general, Defendant objected to Plaintiff’s discovery requests on the grounds that
23 they were vague and overbroad, and therefore irrelevant.

24 Plaintiff’s motion to compel and for imposition of sanctions contends that Defendant’s
25 objections to certain of its discovery requests are invalid and that its responses are inadequate. In
26 response to Plaintiff’s motion, Defendant has filed its own counter-motion to compel and for
27 sanctions.

28 . . .

DISCUSSION

Rule 26(b)(1) of the Federal Rules of Civil Procedure, as amended in 2000, provides that a party may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. Relevancy under Rule 26(b)(1) remains broad and is to be liberally construed. *EEOC v. Caesars Entertainment, Inc.*, 237 F.R.D. 428, 431-32 (D. Nev. 2006). Pursuant to Rule 26(b)(2)(C), the court may limit or restrict discovery on the grounds that the burden or expense of the proposed discovery outweighs its likely benefit. Courts have the duty to pare down overbroad discovery requests under Rule 26(b)(2), which provides that information may sometimes be withheld, even if relevant. *See Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033-34 (9th Cir.1990); *Rowlin v. Alabama Dep't of Public Safety*, 200 F.R.D. 45, 461 (M.D. Ala. 2001); and *Klein v. Freedom Strategic Partners, LLC*, 2009 WL 1606467 (D.Nev. 2009). In deciding whether to restrict discovery, "the court should consider the totality of the circumstances, weighing the value of the material sought against the burden of providing it, and taking into account society's interest in furthering the truth-seeking function in the particular case before the court. *EEOC v. Caesars Entertainment, Inc.*, 237 F.R.D. 428, 431-32 (D. Nev. 2006).

The party opposing discovery has the burden of showing that the discovery is overly broad, unduly burdensome or not relevant. *Graham v. Casey's General Stores*, 206 F.R.D. 251, 253-4 (S.D.Ind. 2000). To meet this burden, the objecting party must specifically detail the reasons why each request is irrelevant. *Id.*, citing *Schaap v. Executive Indus., Inc.*, 130 F.R.D. 384,387 (N.D. Ill. 1990); *Walker v. Lakewood Condominium Owners Assoc.*, 186 F.R.D. 584, 587 (C.D. Cal. 1999). In opposing Plaintiff's motion to compel, Defendant chose to argue the merits of Plaintiff's claims, rather than address the specific discovery requests to which Plaintiff seeks to compel further responses. As indicated above, the Court has already held that there are triable issues of fact on Plaintiff's defamation and Lanham Act claims. In large measure, therefore, Defendant has failed to carry its burden to show that the discovery requests are overly broad or irrelevant. Some of the discovery requests are, however, facially overbroad, and the Court will exercise its discretion under Rule 26(b)(2) to limit the scope of the requests to matters relevant to the claims and defenses in this case.

1 **I. PLAINTIFF'S MOTION TO COMPEL**

2 **1. Discovery Requests Relating to Letters Sent to Other Recipients and**
3 **Information or Documents Concerning Incorp**

4 Plaintiff's discovery requests defined the term "THE LETTERS" as "the
5 COMMUNICATION attached hereto as Exhibit "A" or any COMMUNICATION that is
6 substantially similar to the COMMUNICATION attached hereto as Exhibit A." As discussed
7 above, Exhibit A is the May 28, 2009 letter sent to Klaus Egert.

8 Plaintiff's Interrogatory No. 4 asked Defendant to identify every intended recipient of THE
9 LETTERS. Defendant responded to this interrogatory as follows:

10 Answering Defendant objects to the Interrogatory insofar as it asks
11 for Answering Defendant to identify multiple letters but has only
12 identified a single letter as attached hereto as Exhibit "A". Therefore
13 Answering Defendant is limiting its response to the letter which has
14 been attached as Exhibit "A". Furthermore Answering Defendant is
15 uncertain of the meaning of the term "intended" beyond to whom the
16 letter is addressed. Without waiving the foregoing objections,
17 Answering Defendant responds Klaus Egert.

18 Plaintiff's Interrogatory No. 5 asked Defendant to explain in detail how the list of intended
19 recipients of the LETTERS was created. Defendant objected to this request on grounds similar to
20 its objection to Interrogatory No. 4. Defendant also responded to Interrogatory No. 5 by stating:

21 From a large database of businesses, a small random sampling was
22 exported to a Microsoft Excel file. Answering Defendant considered
23 several factors, including but not limited to the business of the
24 company and the industry in which that the [sic] company was
25 conducting business.

26 Plaintiff's Request for Production No. 6 requested all documents in Defendant's possession
27 regarding Incorp and Request for Production No. 7 requested all communications regarding Incorp.
28 Defendant responded to these requests by stating that it had none.

29 Plaintiff's Request for Production No. 8 requested "ALL DOCUMENTS REGARDING or
30 otherwise supporting THE LETTERS." Defendant responded to this request as follows:

31 Objection, request is overly broad and burdensome and is not
32 designed to lead to discoverable documents and is only intended to
33 harass Answering Defendant.

34 Plaintiff's Request for Admission No. 9 asked Defendant to "admit that YOU sent THE
35 LETTERS to current customers of Incorp." Defendant responded to this request as follows:

1 Objection, Answering Defendant objects to form. Answering
2 Defendant is unable to answer the admission as stated. Answering
3 Defendant is unsure if “current customers” refer to the customers of
 Incorp at the time the letters were sent, or if it refers to customers of
 Incorp at the time of answering this admission.

4 Plaintiff’s March 12, 2010 letter to Defendant’s counsel directed the Defendant to consider
5 the term “current” in Request No. 9 as referring to the time in which the letters were sent. *Motion*
6 *to Compel* (#54), *Exhibit “C.”* Plaintiff states that despite this amendment or clarification,
7 Defendant has still not responded to this request for admission.

8 As Judge Jones recognized in his order denying Defendant’s motion for summary judgment,
9 the May 28, 2009 letter is a form document that, on its face, was intended to advertise NCS’s
10 services and to solicit individuals and entities to use NCS as their registered agent in Nevada in
11 place of their current registered agents. It is reasonable to believe that NCS sent substantially
12 similar form letters to other Nevada limited liability companies or corporations, including entities
13 for whom Plaintiff Incorp was the registered agent at the time the letters were sent and/or received.
14 In this regard, Incorp’s president states that she received a few phone calls from clients who
15 received similar, if not identical letters. Furthermore, Defendant’s answer to Interrogatory No. 5
16 indicates that it prepared a file or list of businesses to whom it sent or intended to send
17 advertisement letters. Plaintiff is entitled to discover from Defendant whether it sent substantially
18 similar letters to other clients of Incorp which stated that the recipient’s “current registered agent
19 may be discontinuing its services” or similar words to that effect.

20 Defendant’s answer to Interrogatory No. 5 indicates that it created a Microsoft Excel file
21 that listed businesses to whom it apparently sent or intended to send the advertisement letters. The
22 Court agrees with Plaintiff that Defendant’s description of the Microsoft Excel file is sketchy. The
23 Court therefore orders Defendant to supplement its answer to Interrogatory No. 5 by providing more
24 detail concerning the file or list of recipients or intended recipients² and the manner in which the

25
26 ² Contrary to Defendant’s objections, the Court does not believe the term “intended
27 recipient” is vague. However, to the extent this term needs clarification, “intended recipient”
28 means an individual or entity to whom Defendant intended to send the advertisement letter,
 regardless of whether Defendant has information that the letter was actually sent and received.

1 file or list was created, including the “several factors” Defendant considered in creating the file or
2 list. This may also be a subject that Plaintiff can more effectively explore through depositions of
3 the Defendants.

4 It is not clear whether NCS specifically targeted companies whose registered agent was
5 Incorp or whether it simply sent the letters to Nevada companies without knowledge of their current
6 registered agents. To the extent that NCS knows or can determine from its own records that Incorp
7 was the registered agent for the recipients of the advertisement letters, then it may and should
8 respond to Interrogatory No. 4 by providing a list of those recipients. If NCS is unable to determine
9 whether the recipients were represented by Incorp at the time the letters were sent, however, then it
10 should identify all individuals or entities to whom it sent letters substantially similar to the May 28,
11 2009 letter. In this latter circumstance, Defendant’s answer to Interrogatory No. 4 will be subject to
12 the “Attorneys’ Eyes Only” provisions of the Protective Order (#52) that was entered on April 5,
13 2010. Plaintiff’s counsel can obtain a list of Incorp’s clients to compare with the list of letter
14 recipients provided by Defendant and thereby determine if any Incorp clients, other than Mr. Egert,
15 received substantially similar letters from NCS. Plaintiff’s counsel shall promptly notify
16 Defendant’s counsel of the identities of such recipients. Plaintiff’s counsel may also inform his
17 client of the identity of any recipients of the letters who were clients of Incorp at the time the letters
18 were sent and/or received. Plaintiff’s counsel, however, shall not disclose the identities of non-
19 Incorp client recipients to Plaintiff.

20 In response to Plaintiff’s Requests for Production 6 and 7, Defendant stated that it did not
21 have any documents regarding Incorp or communications regarding Incorp. The Court agrees with
22 Defendant that these requests should be limited to documents or communications in Defendant’s
23 possession, custody and control prior to the commencement of this lawsuit. The Court cannot order
24 Defendant to produce documents or information that it does not have. To the extent that
25 Defendant’s previous responses to these requests are not correct, however, Defendant is ordered to
26 produce any documents which it had prior to the commencement of this litigation that identify
27 Incorp as the registered agent for recipients or intended recipients of the letters or contain
28 information about Incorp’s business, its business practices, including information relating to the

1 possibility that Incorp might discontinue providing services as a registered agent in Nevada. Such
2 documents, if they exist, are clearly relevant to determining whether Defendant targeted clients of
3 Incorp and/or whether Defendant had a factual basis for stating that the recipient's registered agent
4 might be discontinuing its services.

5 Defendant is also ordered to respond to Request for Production No. 8 by producing copies
6 of any and all letters substantially similar to the May 28, 2009 letter that were sent to other clients
7 of Plaintiff Incorp. The Court recognizes that Defendant may not be able to respond to this request
8 until Plaintiff's counsel advises it as to which recipients were Incorp clients.

9 Request for Admission No. 9, even as clarified by Defendant's March 12, 2010 letter, is
10 ambiguous. It is unclear whether the request asks Defendant to admit that it knew at the time it sent
11 the letters that the recipients were current customers of Incorp, or, alternatively, whether Defendant
12 now admits that some recipients were current customers of Incorp at the time the letters were sent.
13 Depending on how the request is construed, an affirmative response could have different liability
14 consequences, particularly on the issue of intent. The Court therefore sustains Defendant's
15 objection to the request in its current form. Plaintiff may serve an amended request for admission
16 so long as it complies with time limits for conducting discovery under the scheduling order or any
17 extension thereof.

18 **2. Discovery Requests Relating to Defendant's Profits and Financial**
19 **Condition**

20 Plaintiff's Request for Production Nos. 9 and 10 requested documents sufficient to show
21 Defendant's gross revenues and net profits on a monthly basis, since January 2006. Defendant
22 objected to these requests on the grounds that the requests are overly broad, burdensome and not
23 designed to lead to discoverable documents. Plaintiff articulates two grounds in support of its
24 motion to compel responses to these requests. First, Plaintiff argues that under the Lanham Act, it
25 can recover the profits that Defendant derived from its unlawful conduct. Second, Plaintiff argues
26 that it is entitled to discovery regarding Defendant's financial condition in relation to its claim for
27 punitive damages.

28 . . .

1 As to the first ground for Plaintiff's discovery requests, the Court will limit discovery
2 concerning registered agent fees and profits to the fees and profits, if any, that Defendant derived
3 from former customers of Incorp who terminated Incorp and hired Defendant as their registered
4 agent after receiving Defendant's advertisement letters. Defendant is required to produce
5 documents regarding such fees and profits once the identity of Incorp customers who received or
6 likely received the advertisement letters is determined.

7 In regard to Plaintiff's second ground for obtaining Defendant's financial information, the
8 Court orders Defendant to produce its federal income tax returns and any annual financial
9 statements in its possession, custody or control from January 1, 2006 through the present. The
10 production of such documents and information shall be subject to confidentiality provisions of the
11 protective order in this case. Defendant shall produce its tax returns and annual financial statements
12 on or before **June 25, 2010** unless a further extension of time is granted by agreement of the parties
13 or court order.

14 **3. Discovery Requests Relating to Defendant's Business Structure**

15 Plaintiff's Request for Production No. 1 requests documents regarding Defendant's
16 registration of fictitious names in the United States and Canada. Request No. 2 requests documents
17 sufficient to show the names under which Defendant does business in the United States. Request
18 No. 3 requests all documents regarding the formation, maintenance and/or licensing of Defendant as
19 a business entity, including without limitation, all formation documents and filings with any
20 governmental entity in the United States or elsewhere, including by way of example only, all filings
21 with any secretary of state or department of corporations.

22 Defendant objected to these requests as overbroad, burdensome and harassing. Subject to
23 these objections, Defendant produced a computer printout of information on file with the Nevada
24 Secretary of State. Based on Defendant's counsel's representations at the hearing, it is the Court's
25 understanding that NCS is a Nevada corporation with a small number of officers, directors and
26 shareholders. Plaintiff asserts that it needs documentation about Defendant's business structure
27 because it has information that Defendant has disregarded its corporate structure and formalities and
28 has used alter egos to conduct its business. Plaintiff, however, does not provide any factual details

1 to support this assertion. The Court orders Defendant to produce its articles of incorporation, any
 2 fictitious name filings under which it does business, its county and/or city business licenses and its
 3 current list of officers and directors. Defendant shall also produce these documents on or before
 4 **June 25, 2010**. Plaintiff has not demonstrated sufficient grounds to require Defendant to produce
 5 any additional corporate or business organization records.

6 **4. Discovery Requests Relating to the Identity of Defendant's Employees**

7 Plaintiff's Request for Production No. 5 requests documents sufficient to show all of
 8 Defendant's employees and their titles, including all organizational charts. In response to this
 9 request, Defendant identified the Secretary of State Printout, which the Court assumes may list the
 10 officers or directors of the Defendant. The Court was informed at the hearing that Defendant has
 11 identified three employees in response to Plaintiff's interrogatories. To the extent that Defendant
 12 has a document or documents which identify all of its employees, it should produce such
 13 documents. A party cannot be required, however, to prepare, or cause to be prepared, documents
 14 for purposes of production or inspection. 8A Wright, Miller & Marcus, *Federal Practice and*
 15 *Procedure* § 2210 (3rd ed. 2010); *Ascom Hasler Mailing Systems, Inc. v. U.S. Postal Service*, ---
 16 F.R.D. ---, 2010 WL 143709, at *6 (D.D.C. 2010); and *Rockwell Intern. Corp. v. H. Wolfe Iron and*
 17 *Metal Co.*, 576 F.Supp. 511, 513 (W.D.Pa. 1983), citing *Soetaert v. Kansas City Coca Cola*
 18 *Bottling Co.*, 16 F.R.D. 1, 2 (W.D.Mo. 1954). Defendant is therefore under no obligation to create
 19 a written list of employees in order to respond to this request.

20 **5. Discovery Request Relating to Consumer Complaints Against Defendant**

21 Plaintiff's Request for Production No. 11 requests all documents regarding consumer
 22 complaints about Defendant or its services. Defendant objected to this request on the grounds that
 23 it is overly broad and burdensome and is not designed to lead to discoverable documents and is
 24 intended only to harass the Defendant. The Court sustains Defendant's objection, in part, and will
 25 limit the scope of what Defendant must produce in response to this request.

26 Plaintiff's action is based on the assertion that the May 28, 2009 advertisement letter
 27 implied that Incorp may be discontinuing its registered agent services and leaving its clients
 28 vulnerable and at risk. *Amended Complaint* (#39), ¶¶ 3-5. Given the scope of Plaintiff's claims,

1 consumer complaints about Defendant's business conduct, unrelated to statements that it allegedly
2 made about its competitors, are irrelevant. The Court therefore limits Request No. 11 to the
3 production of documents relating to complaints that Defendant has made derogatory or defamatory
4 statements about its competitors. The Court orders Defendant to produce any documents in its
5 possession, custody or control that are responsive to Request No. 11 as limited by this order.

6 **6. Discovery Request for All Documents Supporting Defendant's Response**
7 **to Any of Incorp's Interrogatories**

8 Plaintiff's Request for Production No. 12 requests all documents supporting any of
9 Defendant's Responses to any of Incorp's Interrogatories. Defendant did not object to this request,
10 but instead simply responded that "[t]he responses speak for themselves." Rule 34(b)(1)(A)
11 requires that the request describe with reasonable particularity each item or category of items to be
12 inspected or produced. Given the vague nature of Request No. 12, the Court will not require
13 Defendant to respond further to this request.

14 **II. DEFENDANT'S COUNTERMOTION TO COMPEL**

15 Defendant NCS's counter-motion to compel requests that Plaintiff provide information and
16 produce documents showing that Defendant sent allegedly defamatory letters to Plaintiff's clients.
17 Defendant's counter-motion appears to have been filed in reaction to Plaintiff's motion to compel.
18 Prior to filing the counter-motion, Defendant's counsel did not attempt to meet and confer with
19 Plaintiff's counsel to resolve any disputes regarding Plaintiff's discovery responses. Defendant has
20 therefore not complied with its obligations under Fed.R.Civ.Pro. 37(a)(1) and Local Rule (LR) 26-
21 7(b) to attempt to resolve the discovery dispute in good faith prior to filing a motion to compel. *See*
22 *Shuffle Master, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 170 (D. Nev. 1996).

23 Plaintiff responded to Defendant's counter-motion by stating that Mr. Egert is the only
24 person whom it specifically knows to have received the May 28, 2009 advertisement letter.
25 Although Plaintiff's president stated that she received phone calls from a few other customers who
26 reported receiving such letters, Plaintiff is unable to identify who those customers were (are). The
27 Court therefore denies Defendant's counter-motion to compel. Plaintiff may be required, however,
28 to supplement its discovery responses pursuant to Rule 26(e), once it obtains additional information

1 and documents regarding the identities of Incorp customers who allegedly received the
2 advertisement letters.

3 **CONCLUSION**

4 Based on the foregoing:

5 **IT IS HEREBY ORDERED** that Plaintiff's Motion to Compel Production of Documents
6 and Further Responses to Interrogatories and Requests for Admission and Request for Sanctions
7 (#54) is **granted**, in part, and **denied**, in part, in accordance with the foregoing provisions of this
8 order. Defendants's Countermotion to Compel Production of Documents, Responses to
9 Interrogatories and Requests for Admissions (#57) is **denied**. Both parties' respective requests for
10 sanctions are **denied**.

11 **IT IS FURTHER ORDERED** as follows:

12 1. Defendant shall serve supplemental discovery responses in compliance with this
13 Order on or before **July 2, 2010**, except as to those discovery requests that the Court has ordered it
14 to further respond by **June 25, 2010**.

15 2. The discovery cut-off date in this case will be extended to **August 13, 2010** based on
16 the likelihood that the parties will need additional time to complete discovery once the discovery
17 responses are supplemented in accordance with this order. The Court will enter a separate
18 scheduling order with new pretrial deadlines.

19 DATED this 17th day of June, 2010.

20 
21 GEORGE FOLEY, JR.
22 U.S. MAGISTRATE JUDGE
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